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August 7, 2012

VIA ECFS AND HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of Accipiter Communications, Inc. for Temporary Waiver
WC Docket Nos. 10-90 and 10-208
Letter Response to *Ex Parte* Presentation of Cox Communications, Inc.

Dear Ms. Dortch:

Accipiter Communications Inc. (“Accipiter”), submits this letter in response to the Notice of Oral Ex Parte Communications submitted on July 9, 2012 by Cox Communications, Inc. (“Cox”) in the above-referenced dockets (the “Cox Presentation”). The Cox Presentation includes a number of representations that fail to present an accurate picture with respect to Accipiter’s pending Petition for a Temporary Waiver, and Accipiter is compelled to respond to ensure that the Commission receives an accurate representation of the relevant facts.

Representations in the Cox Presentation are Inaccurate and Without Basis

Cox claims that, “Most of the places where Accipiter and Cox compete are with master-planned developments and connecting areas.” It is true that Accipiter competes with Cox within certain master-planned developments. Accipiter, however, also provides service elsewhere, in areas not served by Cox. In fact, Accipiter’s service territory covers approximately 1000 square miles, while the area in which Cox provides service is only approximately seven square miles. Within Accipiter’s service area, Cox *only serves* the master planned communities of Vistancia, Festival Ranch and Bell Pointe. The respective areas served by Accipiter and Cox are shown on the attached maps which are described in detail below. Cox’s choice to provide service only within master planned communities in Accipiter’s service area necessarily means that those are the only areas where Accipiter and Cox can compete. The point of Cox’s assertion is unclear but, in any event, Cox’s statement is self-evident – Accipiter obviously only competes with Cox in the areas where Cox elects to provide service.

Cox goes on to claim that “Accipiter has been spending most of its efforts to build out in places where it competes with Cox, not to serve underserved populations in sparsely populated areas.” As an initial matter, that is an untrue statement. Accipiter has invested, and continues to invest,

heavily in serving rural areas and underserved populations – indeed, the majority of its investment is in those areas. Worse, however, is the fact that Cox’s claim is pure, uninformed speculation. Cox has absolutely no basis for its claim, and no way of knowing how Accipiter “has been spending most of its efforts.”

Cox dismissively claims that portions of Accipiter’s service area are slated to be developed, and that Accipiter merely seeks continued “large subsidies to support the company while it waits for this development to occur.” Cox misapprehends the reality of deployment in underserved areas. First, Cox provides no definitive timetable for when this future development is scheduled to occur and, given the current economic climate, it certainly cannot be assumed that development is imminent. Second, when Accipiter serves areas with reasonable population densities and resultant economies of scale, revenues from service to those areas helps offset the costs incurred in serving rural areas where Cox chooses not to provide service. This *internal* subsidization actually serves to *lower* Accipiter’s dependence on USF support while still providing the assurance of a company with carrier of last resort obligations available to provide service in rural areas no one else will serve. In contrast, Cox gains the full benefit of serving more densely populated areas with no carrier of last resort obligations and no service provided to rural areas.

The map included in the Cox Presentation is misleading in the extreme. It shows the metropolitan Phoenix area, but does not show the boundary of Accipiter’s service area. Accipiter attaches a series of more accurate maps to this correspondence as Attachment 1. Broadly speaking, the maps show Accipiter’s service area boundary, its subscribers, unserved areas, and areas where Accipiter provides service, but Cox does not. In particular, the red borders on the map show the parameters of Accipiter’s official study area. Within these areas, red dots show Accipiter’s customers, yellow dots show unserved establishments that Accipiter does not yet pass, green dots show establishments that are passed by Accipiter, but do not yet subscribe to Accipiter’s service and are unserved by any carrier, and the three small, blue-bordered areas show Cox’s service area. The yellow shaded areas show territory where Accipiter has requested, but not yet received, a study area waiver.

Several conclusions can be drawn from even a cursory review of these maps. First, contrary to Cox’s claims, Accipiter presently provides service to a large number of customers far outside Cox’s limited service area, in very remote locations. Second, there are a number of rural establishments that Accipiter presently passes, but who do not yet take service (the green dots). As Accipiter adds these customers, Accipiter’s per-line costs will continue to decrease. Third, there are significant numbers of establishments in Accipiter’s service area that are unserved and not yet passed by Accipiter (the yellow dots) or any other landline carrier. Accipiter cannot provide service to these establishments without building additional facilities, and Accipiter cannot continue to build facilities out to these potential customers without grant of its waiver request, which will allow the company to continue to operate, add lines, and extend facilities to unserved customers. In sum, these red, yellow and green dots outside of Cox’s service area are all customers either presently or potentially receiving service from Accipiter and no other carrier. Fourth, under the circumstances that exist in Accipiter’s operating territory if Accipiter may

include for USF purposes only those customers who have no alternative service provider, the per-line cost of serving customers in the parts of Accipiter's service area where Cox does not provide service would be far in excess of the Commission's \$3,000 yearly cap on support – meaning that there would be no economically viable way to serve most of these customers.

Finally, notwithstanding Cox's apparent chagrin concerning its documented anticompetitive behavior, Accipiter has already explained the ongoing relevance of Cox's exclusive service arrangement in the Vistancia development. Accipiter has shown that it is a growing company, and that as it adds lines, it will grow out of the per-line caps on support. Indeed, the maps Accipiter submits with this letter demonstrate Accipiter's ability to compete successfully with Cox in the limited areas Cox elects to serve once Accipiter was allowed to provide service in these areas. Nevertheless, Cox's past conduct is relevant because Accipiter's initial growth was hamstrung by the anticompetitive arrangement designed to keep out competitors like Accipiter. It continues to be true that Cox would obviously prefer it if Accipiter did not compete with Cox. It would certainly be convenient for Cox to be the only service provider in the areas where Cox chooses to offer service. Indeed, it is strange that Cox is expending so much effort to argue against Accipiter's request for a waiver, which is otherwise *unopposed*. In any event, Cox's desire to become an exclusive service provider cannot change the following facts: (1) Accipiter provides service in areas served by no other carrier; (2) Accipiter requires USF support to serve its rural study area; and (3) customers in those areas will lose service if Accipiter is unable to survive. These facts warrant an expeditious grant of the relief Accipiter seeks in its Petition for Temporary Waiver.

Accipiter's Amended Waiver Request Seeks Narrow, Targeted Relief

As amended, Accipiter's waiver request seeks only that the Commission take account of Accipiter's rapid growth as a new service provider and allow Accipiter to rely on its current line counts, rather than the outdated line counts that would otherwise be used to calculate support. With that limited waiver, Accipiter will be able to continue to add lines to provide service to new customers in underserved areas through the end of 2013

The Wireline Competition Bureau recently granted the waiver request of another carrier, Allband Communications. The Bureau's decision strongly counsels in favor of granting the limited relief Accipiter seeks. In granting Allband's waiver request, the Bureau found special circumstances that warrant relief, including the fact that, "Unlike many other incumbent telephone companies, Allband is a relatively new company, and therefore has significant startup costs and undepreciated plant."¹ Data released by the Bureau accompanying its April 25, 2012 Order showed that Accipiter ranked tenth out of 726 study areas in terms of its undepreciated plant,

¹ *Allband Communications Cooperative Petition for Waiver of Certain High-Cost Universal Service Rules*, Order, WC Docket No. 10-90, DA 12-1194, ¶ 11 (WCB July 25, 2012).

reflecting Accipiter's recent expansion into previously unserved areas and associated construction to provide services to residents who previously had no access to service from any provider. Indeed, 73 percent of Accipiter's total telecommunications plant investment has been made since the beginning of 2006. The Bureau stated that, "Allband serves a remote, heavily forested and unserved area..."² Accipiter serves a remote and mountainous area which was previously unserved and which still contains unserved residents. The Bureau stated that, "Allband is not in a position to immediately reduce its expenses."³ Accipiter's current operational expenses are reasonable given the company's size, growth trajectory and requirement to invest in providing service in underserved areas, and Accipiter cannot immediately reduce its expenses without threatening its operational capabilities and its ability to continue to expand in a manner that will ultimately allow the company to operate within the Commission's per-line caps. Finally, the Bureau noted that it expected Allband, during the three year period of its waiver, to "continue efforts to expand its subscriber base to the extent possible and lower its support needs on a per-line basis..."⁴ This kind of expectation is at the heart of Accipiter's waiver request – with a limited, temporary waiver of even more limited duration than Allband's, the company will be able to continue the robust subscriber growth that will allow it to lower its support needs on a per-line basis. Accipiter's request is reasonable, seeks no greater relief than is required, and is necessary to prevent customers from potentially losing service. The Bureau should act expeditiously to grant Accipiter's waiver request, as amended.

Sincerely,

/s/ Patrick Sherrill

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Enclosures

² *Id.*

³ *Id.* at ¶ 12.

⁴ *Id.* at ¶ 14.

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ATTACHMENT 1

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